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Supreme Court, U.S.
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MAY 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER 1988

HERBERT O. JENSEN,

PETITIONER,

v.

TERRY HAINES, WARDEN,

RESPONDENT.

PETITION FOR WRIT OF CERTORARI

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

HERBERT O. JENSEN
BOX 5521 NDSP
BISMARCK, ND 58502-5521
PRO SE

I

QUESTIONS PRESENTED FOR REVIEW

1. Did the Appeals Court abuse its discretion in Ordering a Attorney to represent the Appellant when Appellant was proceeding pro se and had paid Appeal fees and filed Appellant Brief stating Appellant waived Oral argument in same brief ?

2. Did the Appeals Court error in denying the Appellant the opportunity to respond to Show Cause Order of claim of failre to receive such order through the penitentiary mails ?

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THE PETITIONER, HERBERT O. JENSEN, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DENIAL OF MOTION TO REMEDY DEFAULT, DTD 3/1/88; ORDER FOR FAILURE TO PROSECUTE, DTD 2/3/88; ORDER TO SHOW CAUSE WHY APPELLANT NOT BE REQUIRED TO PROCEED EITHER ON HIS OWN BEHALF OR WITH RETAINED COUNSEL.

OPINION BELOW

THE ORDER OF DENIAL OF MOTION TO REMEDY DEFAULT BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS ATTACHED HERETO AS APPENDIX A. THE ORDER, BY THE UNITED STATES COURT OF APPEALS FOR FAILURE TO PROSECUTE, DTD 2/3/88 IS ATTACHED HERETO AS APPENDIX B. ORDER TO SHOW CAUSE WHY APPELLANT NOT BE REQUIRED TO PROCEED EITHER ON HIS OWN OR WITH RETAINED COUNSEL, DTD 10/5/88 IS ATTACHED HERETO AS APPENDIX C. ORDER GRANTING PROBABLE CAUSE AND CONSOLIDATING TWO APPEALS FOR PURPOSE OF BRIEFING AND SUBMISSION TO THE COURT, DTD 8/28/87 IS ATTACHED HERETO AS APPENDIX D.

JURISDICTION

THIS COURT'S JURISDICTION IS INVOKED UNDER TITLE 28 U.S.C. SEC. 1254 (1).

STATUTORY PROVISIONS INVOLVED

PETITIONER CLAIMS THE THE FOURTEENTH AMEMDMENT TO THE UNITED STATES CONSTITUTION HAS BEEN VIOLATED UNDER IN AN ATTEMPT TO PROSECUTE 'TOTALITY OF PRISON CONDITIONS' FOR PUNITIVERE PLACEMENT IN THE DISCIPLINARY SEGREGATION AT THE NDSP.

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS,CORRECTIONS ARE ATTACHED AS APPENDIX E. STATE OF NORTH DAKOTA ENACTMENTS ARE ATTACHED AS APPENDIX F.

STATEMENT OF THE CASE

APPELLANT APPEALED TO THE 8TH CIRCUIT COURT OF APPEALS FROM DISMISSAL WITH PREJUDICE OF A HABEAS CORPUS PETITION AND 1983 ACTION REQUESTING RELIEF OF LOSS OF GOOD TIME AND DAMAGES WHILE INCARCERATED IN THE NORTH DAKOTA STATE PENITENTIARY DISCIPLINARY SEGREGATION CELLS THAT DID NOT HAVE HOT RUNNING WATER, AND FOR A TIME IN A CELL THAT CONTAINED NO WATER

EXCEPT FOR TOILET WATER, NO LIGHTS, NO EXERCISE, NO VENTILATION UNDER 'TOTALITY OF PRISON CONDITIONS'.

APPELLANT WAS FOUND GUILTY OF REFUSING TO PROVIDE URINE FOR A ROUTINE SCREENING TEST.

APPELLANT WAS DECLARED NON-INDIGENT BY THE NORTH DAKOTA SUPREME COURT IN STATE V. JENSEN, 265 NW2D 691 AS HE RECEIVES A PENSION FOR 20 YEARS ACTIVE FEDERAL SERVICE.

APPELLANT HAD PAID ALL FILING FEES AND BOND ON APPEAL AND FILED APPELLANT'S BRIEF IN A TIMELY MANNER. APPELLANT HAD WAIVED APPEARANCE FOR HEARING IN APPELLANT'S BRIEF WHEN THE 8TH CIRCUIT PUBLISHED ITS ORDER FOR APPOINTMENT OF COUNSEL. (SEE APPENDIX D).

REASONS FOR GRANTING THE WRIT

I

APPEAL PROCESS WAS INTERFERRED WITH BY UNKNOWN FEDERAL JUDGE WHO ASSIGNED AN ATTORNEY WITHOUT APPELLANT'S KNOWLEDGE OR PERMISSION WHILE APPELLANT WAS FILING PRO SE

APPELLANT CLAIMS THAT THE APPOINTMENT OF ATTORNEY JON STRINDEN FROM THE FIRM OF ZUGER

& BUCKLIN WITH WHOM THE APPELLANT HAD FILED A CIVIL RIGHTS ACTION AGAINST WAS PREJUDICAL WITHOUT ANY CONSULTATION WITH EITHER PARTIES.

APPELLANT PROMPTLY DISCHARGED MR. STRINDEN AND SUGGESTED BY MOTION TO THE 8TH CICRUIT THE APPOINTMENT OF MR. RALPH VINJIE IN MR. STRINDEN'S STEAD.

THE 8TH CIRCUIT DENIED THE MOTION AND REQUESTED A SHOW CAUSE BY APPELLANT. (SEE APPENDIX D.).

THE U.S.SUPREME COURT STRUCK DOWN PRISON PRACTICES WHICH ARE DESIGNED TO HINDER INMATES IN THE PRESENTATION OF THEIR LEGAL GRIEVANCES. Ex Parte Hull, 61 S.Ct. 640.

IMPLICIT IN THE CONVENTIONAL NOTION OF ACCESS TO THE COURTS ARE THE TWO CONCEPTS ESPOUSED:

1) A PERSON MUST BE FREE TO VINDICATE IN THE COURTS RIGHTS SECURED BY THE; CONSTITUTION OF THE UNITED STATES;

2) NO CUSTODIAN MAY IMPEDE THE ACCESS TO THE COURTS OF ONE CONFINED TO HIS CUSTODY.

INDIGENT PRISONER IS A MILITARY RETIREE WITH A LIMITED INCOME WHO MUST PAY LEGAL FEES, BONDS AND OTHER LEGAL MATERIALS AND CANNOT AFFORD ANY PAYMENTS TO ATTORNEYS OR CONDITIONS IMPOSED FOR

PAYMENT OF ATTORNEY FEES. APPELLANT DOES NOT LOSE ALL HIS CONSTITIONAL RIGHTS UPON INCARCERATION.

COFFIN V. REICHARD, 143 F2D 443.

THE RIGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE INDIGENT PRISONER, UNEDUCATED IN THE LAW, TO THE TOOLS NECESSARY TO RECEIVE ADEQUATE HEARING IN THE 8TH CIRCUIT COURT OF APPEALS HAS RECEIVED SPECIAL RE-ENFORCEMENT IN OTHER FEDERAL COURTS.

GIDEON V. WAINWRIGHT, 83 S.CT. 792;
DOUGLAS V. CALIFORNIA, 83 S.CT. 814;
GRIFFIN V. ILLINOIS, 76 S.CT. 585;
RICHARDS V. TOWNSEND, 303 FSUPP 793.

II

AFTER SENDING ORDER OF DISMISSAL FOR LACK OF PROSECUTION THE 8TH CIRCUIT COURT OF APPEALS SHOULD HAVE ALLOWED PRO SE APPELLANT PERMISSION TO CORRECT DEFAULT TO HIS CLAIM OF FAILURE TO RECEIVE ORDER THROUGH U.S. MAILS AT THE NORTH DAKOTA STATE PENITENTIARY.

ON 2/3/88, APPELLANT RECEIVED ORDER OF DISMISSAL FOR LACK OF PROSECUTION. MOTION WAS

MADE TO CORRECT DEFAULT AND REFUSED BY THE 8TH CIRCUIT.

APPELLANT HAS HAD A LONG HISTORY IN DEALING WITH THE NDSP MAILING PROBLEMS. IN THE LAST YEAR THE NDSP HAS LOST DOCUMENTS FOR PHOTOCOPYING, PLACED INCORRECT POSTAGE TO PREVENT TIMELY FILING OF APPELLANT'S BRIEFS IN WHICH CASE WAS DISMISSED. GRIEVANCES HAVE BEEN FILED BUT THE WARDEN UPHELD THE ACTIONS OF HIS STAFF. THE WARDEN, TERRY HAINES, HAS BEEN REMOVED FOR HIS ACTIONS, BUT HOWEVER THE SAME CORRECTIONAL OFFICERS ARE STILL IN CHARGE OF DEALING WITH THE PENITENTIARY MAIL.

APPELLANT HAS FILED IN THE U.S. DISTRICT COURT, NO. A1-88-003 OF HIS CLAIMS CONCERNING MAIL ABUSE AND RULES OF THE NDSP.

THE INMATE HAND BOOK DTD FEBRUARY 1984, PAGE 11 STATES THAT THE LEGAL MAIL SHALL NOT BE HELD MORE THAN 48 HOURS. AT THE NDSP INMATES HANDLE THE MAIL AND CERTAIN INDIVIDUALS THAT ARE FAVORED BY THE PROPERTY OFFICER ARE ALLOWED WHERE MAIL IS SORTED BY THE INMATES. THESE INMATES HAVE BEEN NAMED IN THE GRIEVANCES AND

ARE ILL FAVORED TOWARD THE APPELLANT.

APPELLANT HAS WROTE A LETTER TO THE ACTING WARDENS BUT THE PRACTICE OF ALLOWING INMATES TO ROAM IN THE PROPERTY OFFICE BY FAVORED INMATES STILL CONTINUES. THE INMATES ALLOWED IN THE PROPERTY OFFICE HAVE BEEN GIVEN APPELLANT'S MAIL IN THE PAST AND APPELLANT FEARS THAT THIS PRACTICE WILL CONTINUE IN THE FUTURE WAS THE LEADING CONTRIBUTION IN LOSS OF ORDER FROM 8TH CIRCUIT COURT OF APPEALS.

FOLLOWING Ex Parte Hull, DECISION THE LOWER COURTS HAVE CRITICALLY EXAMINED ATEMPTS BY PRISON ADMINISTRATORS TO CENSOR, SCREEN, OR IN ANY WAY INTERFERE WITH COMMUNICATIONS WITH THE COURTS.

Bryan v. Werner, 516 F2d 233;
Sostre v. McGinnis, 442 F2d 178.

IN ONE CASE, A FEDERAL COURT INVALIDATED THE PRISON POLICY OF COPYING LETTERS COMPLAINING OF INSTITUTIONAL MISTREATMENT ADDRESSED TO JUDGES.
Carothers v. Follette, 314 FSupp 1014.

SIMILARLY, PRISON REGULATIONS LIMITING THE CONFIDENTIALITY OF CORRESPONDENCE WITH FEDERAL COURTS HAVE BEEN FOUND ARBITRARY AND

UNREASONABLE.

BATTLE V. ANDERSON, 373 FSUPP 402.

CONCLUSION

IT IS RECOMMENDED THAT THE UNITED STATES POSTAL DEPARTMENT SHOULD HAVE INDEPENDENT OBLIGATIONS TO INVESTIGATE AND ENSURE THAT UNCONSTITUTIONAL RESTRICTIONS ARE NOT PLACED ON AN INMATE'S FREEDOM TO CORRESPOND WITH THE FEDERAL COURTS.

AMERICAN BAR ASSOCIATION, JOINT COMMITTEE ON THE LEGAL STATUS OF PRISONERS, PROPOSED STANDARD 2.1(A)(REPRINTED IN APPENDIX E.)(GOVERNMENT AUTHORITIES SHOULD TAKE AFFIRMITIVE STEPS TO ENSURE JUDICIAL ACCESS).

DATED THIS 18TH DAY OF MAY 1988.

Herbert O. Jensen

HERBERT O. JENSEN
BOX 5521 NDSP
BISMARCK, ND 58502-5521

SUBSCRIBED AND SWORN HERETO BEFORE ME ON THIS 18TH DAY OF MAY 1988.

Teresa Bailey

NOTARY PUBLIC

MY COMMISSION EXPIRES ON:

Oct 14, 1991

CERTIFICATE OF SERVICE BY MAIL

IT IS HEREBY CERTIFIED THAT A TRUE AND CORRECT ENCLOSED PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES SUPREME COURT WAS MAILED: 40 COPIES - J.F. SPANIOL, JR., CLERK OF COURT, ONE 1ST ST., N.E., WASHINGTON, D.C. 20543; 2 COPIES NICKOLAS SPAETH, ATTORNEY GENERAL, STATE CAPITOL BLDG., BISMARCK, ND 58505, WAS MAILED ON THIS 18TH DAY OF MAY 1988, POSTAGE PREPAID AT THE NDSP, BOX 5521, BISMARCK, ND 58502-5521.

Herbert O. Jensen

HERBERT O. JENSEN
BOX 5521 / NDSP
BISMARCK, ND 58502-5521

SUBSCRIBED AND SWORN HERETO BEFORE ME ON THIS 18TH DAY OF MAY 1988.

Teresa J. Baeth
NOTARY PUBLIC

MY COMMISSION EXPIRES ON:
Oct 14, 1991

APPENDIX A

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5293ND/87-5294ND

HERBERT O. JENSEN APPELLANT VS. TERRY HAINES ET AL., APPELLEE	* * * * * * * * * * *	APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF NORTH DAKOTA

PRO SE APPELLANT'S MOTION FOR PERMISSION TO REMEDY DEFAULT OF FAILURE TO RESPOND TO THE SHOW CAUSE ORDER IS DENIED.

MARCH 1, 1988.

ORDER ENTERED AT THE DIRECTION OF THE COURT:

/S/ROBERT D. ST. VRAIN

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATE COURT OF APPEALS

FOR THE EBGHTH CIRCUIT

No. 87-5293ND/87-5294ND

HERBERT O. JENSEN, APPELLANT,	*	
VS.	*	APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA
TERRY HAINES, ROBERT COAD, TIMOTHY SCHUETZLE, ROBERT URLICK, LINDA BERTCH, TIM BULEY, MICHAEL COLLING, DAVID MUECHEL, DON REIDMAN, ARNOLD SCHNEIDER, JOHN DOE, GUEST OF ARNOLD SCHNEIDER AND STATE BONDING FUND, APPELLEES.	*	

ON OCTOBER 1987 APPELLANT WAS DIRECTED TO SHOW CAUSE WHY HE SHOULD NOT BE REQUIRED TO PROCEED EITHER ON HIS OWN BEHALF OR WITH RETAINED COUNSEL. APPELLANT HAS FAILED TO RESPOND AND THE TIME FOR FILING A RESPONSE HAS EXPIRED. THESE APPEALS ARE, THEREFORE, DISMISSED FOR FAILURE TO PROSECUTE. SEE EIGHTH CIRCUIT RULE 13. FEBRUARY 3, 1988.

ORDER ENTERED AT THE DIRECTION OF THE COURT.

/S/ROBERT D. ST. VRAIN

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 87-5293ND/87-5294ND

HERBERT O. JENSEN	*	
APPELLANT	*	
VS.	*	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA
TERRY HAINES	*	
APPELLEE	*	

FILED: OCTOBER 5, 1987

ORDER

THE MOTION OF JON STRINDEN, ESQ., FOR LEAVE TO WITHDRAW IS GRANTED, AND MR. STRINDEN IS RELIVED OF ANY FURTHER DUTY TO THE APPELLANT.

THE MOTION OF THE APPELLANT FOR APPOINTMENT OF RALPH VINJI, ESQ., IS DENIED, WITHOUT PREJUDICE, HOWEVER, TO APPELLANT'S RIGHT TO RENEW IT, IF APPROPRIATE, FOLLOWING THE FURTHER PROCEEDINGS WE ARE ABOUT TO DESCRIBE.

APPELLANT DID NOT APPLY FOR IN FORMA PAUPERIS

STATUS IN THE DISTRICT COURT. HE HAS PAID HIS FILING FEES IN THIS COURT. IN ADDITION, IT APPEARS THAT APPELLANT MAY HAVE SUBSTANTIAL PROPERTIES THAT PRODUCE INCOME. APPELLANT IS DIRECTED TO SHOW CAUSE, WITHIN 15 DAYS OF THE ENTRY OF THIS ORDER, WHY HE SHOULD NOT BE REQUIRED TO PROCEED EITHER ON HIS OWN BEHALF OR WITH RETAINED COUNSEL.

IT IS SO ORDERED.

A TRUE COPY.

ATTEST: /S/ROBERT D. ST. VRAIN

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5293	*	
HERBERT O. JENSEN, APPELLANT, VS. TERRY HAINES ET AL., APPELLEES.	*	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA
No. 87-5294	*	
HERBERT O. JENSEN APPELLANT VS. TERRY HAINES, APPELLEE.	*	

ORDER

APPELLANT'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE IN 7-52-53-94 GRANTED.

ON THE COURT'S OWN MOTION, APPELLANT IS

GRANTED LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS. JON STRINDEN OF BISMAARCK, NORTH DAKOTA IS HEREBY APPOINTED UNDER THE TERMS OF THE CRIMINAL JUSTICE ACT TO REPRESENT APPELLANT IN NO. 87-5294. MR. STRINDEN IS APPOINTED PURSUANT TO THE INHERENT POWER OF THE COURT TO REPRESENT APPELLANT IN 87-5293.

THE TWO APPEALS ARE CONSOLIDATED FOR PURPOSES OF BRIEFING AND SUBMISSION TO THE COURT. THE CLERK IS DIRECTED TO ESTABLISH A JOINT BRIEFING SCHEDULE.

AUGUST 28, 1987.

ORDER ENTERED AT THE DIRECTION OF THE COURT:
/S/ROBERT D. ST.VRAIN
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX E

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS

Chapter 2 - Rights of Offenders

2.1 - Access to Court:

Each correctional acency should immediatley develop and implement policies and procedures to fulfill the right of persons under correctional supervision to have access to courts to present any issue cognizable therein, including (1) challenging the legality of their confinement or conviction; (2) seeking redress for illegal conditions or treatment while incarcerated or under correctional control; (3) pursuing remedies in connection with civil legal problems;and (4) asserting against correctional or other governmental authority any other rights proteced by constitutional or statutory provison or common laws. . . . .

3. Where complaints are filed aginst conditions of correctional control or against the administrative actions or treatment by correctional or other governmental authorities,

OFFENDERS MAY BE REQUIRED FIRST TO SEEK RECOURSE UNDER ESTABLISHED ADMINISTRATIVE PROCEDUTES AND APPEALS AND TO EXHAUST THEIR ADMINISTRATIVE REMEDIES. ADMINISTRATIVE REMEDIES SHOULD BE OPERATIVE WITHIN 30 DAYS AND NOT IN A WAY THAT WOULD UNDULY DELAY OR HAMPER THEIR USE BY AGGRIEVED OFFENDERS. WHERE NO REASONABLE ADMINISTRATIVE MEANS IS AVAILABLE FOR PRESENTING AND RESOLVING DISPUTES OR WHERE PAST PRACTICE DEMONSTRATES THE FUTILITY OF SUCH MEANS, THE DOCTRINE OF EXHAUSTION SHOULD NOT APPLY.

4. OFFENDERS SHOULD NOT BE PREVENTED BY CORRECTIONAL AUTHORITY ADMINISTRATIVE POLICIES OR ACTIONS FROM FILING TIMELY APPEALS OF CONVICTIONS OR OTHER JUDGMENTS; FROM TRANSMITTING PLEADINGS AND ENGAGING IN CORRESPONDANCE WITH JUDGES, OTHER COURT OFFICIALS, AND ATTORNEYS; OR FROM INSTITUTING SUITS AND ACTIONS. NOR SHOULD THEY BE PENALIZED FOR SO DOING.

APPENDIX F

NDCC 12-47-26

UNIFORM KINDLY TREATMENT OF INMATES:

THE WARDEN AND ALL OFFICERS OF THE PENITENTIARY UNIFORMLY SHALL TREAT HE INMTES THEREOF WITH KINDNESS, AND THE WARDEN SHALL REQUIRE OF THE OFFICERS AND GUARDS THAT, IN THE EXECUTION OF THEIR RESPECTIVE DUTIES, THEY IN ALL CASES SHALL REFRAIN FROM BOISTEROUS AND UNBECOMING LANGUAGE IN GIVING THEIR ORDERS AND COMMANDS. NO CORPORAL OR OTHER PAINFUL OR UNUSUAL PUNISHMENT SHALL BE INFLICTED UPON THE INMATES OF THE PENITENTIARY FOR VIOLATION OF THE RULES AND REGULATIONS THEREOF.